



Issue Date: 27 June 2013

CASE No:2008-CAA-00003

In the Matter of:

DOUGLAS EVANS,
Complainant,

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**Order Compelling EPA to Provide Electronic Information and to
Produce Correspondence**

Douglas Evans, the Complainant, moved to compel the United States Environmental Protection Agency (“EPA”) to provide him with electronic versions of previously discovered materials and to disclose correspondence between an EPA manager and another individual the Complainant alleges suffered employment retaliation from the EPA for whistleblowing activity, Jim Benetti. The motion is granted: the EPA must provide the earlier discovery in one of the requested formats and produce the correspondence.

I. Background

The Complainant worked at the EPA Radiation and Indoor Environments (“R&IE”) laboratory in Las Vegas, Nevada.¹ The discovery relates to his allegation that he suffered employment retaliation because he complained about the way EPA management required all employees to participate in emergency response work in the event of an environmental emergency, when they were insufficiently trained.² He complained to OSHA on May 26, 2006; OSHA investigated and on November 21, 2007, determined he hadn’t

¹ Complainant’s Motion to Compel (“Motion”) at 2.

² *Id.*

suffered retaliation.³ The Complainant objected and requested a hearing.⁴ In this litigation, the Complaint served the EPA with interrogatories and requests for production of documents that specifically asked for production of electronic documents in electronic form.⁵

Instead of responding to the discovery requests, the EPA moved to dismiss the complaint for lack of jurisdiction, arguing it didn't have to provide discovery in the case because the Complainant hadn't shown he had engaged in activity the Act protected.⁶ Judge Torkington dismissed the complaint, without leave to amend, on March 11, 2008, finding the Complainant failed to show a reasonable belief that the EPA's actions violated environmental regulations or posed any danger to the public.⁷

After a lengthy appeals process, the case was ultimately remanded to allow the Complainant to amend his complaint,⁸ which he filed on September 27, 2012.⁹ On October 19, 2012, the EPA responded to the interrogatories and requests for admission served 5 years earlier—in December 2007.¹⁰ The EPA produced hard copies of the documents, yet never objected to the Claimant's request to provide the discovery in electronic form.¹¹ The EPA did object to discovery requests seeking written communications from Dick Hopper, one of the Complainant's managers, related to Jim Benetti, another laboratory employee the Complainant believes suffered similar retaliation.¹²

After a failed attempt to resolve the discovery dispute informally, the Complainant moved to compel production of:

1. Electronic versions of all electronic documents the EPA produced in hard copy; and

³ See Secretary's Findings, OSHA No. 9-0050-06-013, at 1.

⁴ Motion at 5.

⁵ *Id.* at 5, Appendix at 12.

⁶ See EPA's Motion to Dismiss at 15–17.

⁷ See *Evans v. EPA*, ALJ No. 2008-CAA-00003, ARB Case No. 08-059, Decision & Order Dismissing Complaint, slip op. at *5.

⁸ See *Evans v. EPA*, Decision & Order of Remand (ARB July 31, 2012).

⁹ See Amended Complaint of Retaliation Against Whistleblower Under 29 CFR Part 24.

¹⁰ EPA's Responses to Complainant's First Request for Production of Documents; Motion, at Appendix 21.

¹¹ See Motion, Appendix at 21–45.

¹² See *id.* at 2–3, 5.

2. Dick Hopper’s correspondence with or about Jim Benetti, including any discipline imposed on Benetti.¹³

The EPA objected to both. It argues that retrieving emails between Dick Hopper and Jim Benetti “is either not possible or would be a prohibitively expensive and time consuming exercise” because both Dick Hopper and Jim Benetti have left the EPA and their email records were not preserved.¹⁴

For the reasons described below, I grant the Complainant’s motion and order the EPA to provide the requested discovery.

II. Analysis

I address each discovery request—for electronic production of documents and for production of correspondence between Dick Hopper and Jim Benetti—in turn.

A. Electronic Records Are Discoverable in Electronic Form and the EPA Failed to Object to the Complainant’s Request for Electronic Production in its Discovery Responses

OALJ’s current Rules of Procedure do not specifically mention electronic discovery, which was not a significant concern when those rules were published in 1983.¹⁵ However, § 18.1(a) instructs parties that the Federal Rules of Civil Procedure “shall be applied in any situation not provided for or controlled by these rules.”¹⁶

Since 1970, Rule 34(b) has required production of hard-copy materials by the responding party either as they are kept in its ordinary course of business or arranged to correspond to the categories of the request. This guards against risks that a producing party might attempt to rearrange materials to obscure the importance of certain items. The 2006 amendments to the federal discovery rules dealing with electronically stored information provide similar protections and guidance to litigants for electronic forms of discovery.¹⁷

Rule 34 allows a party to request discovery of electronic documents and to specify the form in which such electronic data shall be produced.¹⁸ The responding party may object to the form requested;

¹³ *Id.* at 1.

¹⁴ EPA’s Opposition at 5.

¹⁵ 48 Fed. Reg. 32538 (July 15, 1983).

¹⁶ 29 C.F.R. § 18.1(a).

¹⁷ This amendment to Rule 34 became effective December 1, 2006, well before the Claimant’s discovery request in this case.

¹⁸ R. Fed. Civ. P. 34(b)(1)(C).

if it does so, it must specify the alternate form it will use to produce the material in its objection.¹⁹

The Complainant requested that the EPA provide electronic information in both the original file format of the information and in one of the following formats: “Rich Text Format, Lotus AmiPro, Lotus 123, Outlook Express.”²⁰ If these formats are unavailable, the Complainant requested the data be provided in searchable PDF files with all metadata produced along with the contents of the file.²¹

The EPA’s October 19, 2012 response to this discovery request attached e-mails and other electronic documents in hard-copy form, ignoring the request to provide the data in the designated digital formats.²²

The Complainant received these hard-copy documents in mid-October 2012. He didn’t object to the form of their production until February 5, 2013.²³ The EPA asserts his objection should be deemed untimely as a result. But that misstates the law—it was the EPA that should have, and failed to, object to the format for production the Claimant requested. The EPA’s lawyer didn’t respond to the Complainant’s attempt to informally resolve his problems with the EPA’s document production, emailed on November 30, 2012, until January 25, 2013, months later. The EPA’s untimeliness defense, which seeks to avoid producing the electronic data the Complainant timely requested, fails.²⁴

The EPA argues, citing no authority, that the hard-copy documents it has provided comport with its discovery obligations because hard-copy production “does not disadvantage [the Complainant’s] prosecution of his whistleblower retaliation claims.”²⁵ This just isn’t so, for two reasons. First, some form of electronic production is consistent with the principle in effect since 1970 that

¹⁹ R. Fed. Civ. P. 34(b)(2)(D).

²⁰ Complainant’s First Request for Production at 1; Motion, Appendix at 12.

²¹ *Id.*

²² *See* EPA’s Discovery Response; Motion, Appendix at 21–45.

²³ *See* Motion, Appendix at 55.

²⁴ This very situation was contemplated by the drafters of the electronic discovery provisions of Rule 34, who hoped that requiring the responding party to object early to the requested form for electronic documents would allow parties to resolve disputes “before the expense and work of the production occurs.” They cautioned that if a party fails to timely object to the form of production it “runs the risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form.” *See* the Advisory Committee Notes on Rule 34—2006 Amendment.

²⁵ EPA’s Opposition at 7.

materials should be produced in the form they are kept in the normal course of business. No reasonable person could believe that in day to day operations employees at EPA print out all of their electronic communications on paper and then preserve and work with them in paper file folders.²⁶ Second, Rule 34 says that if no form for producing electronically stored information were specified, it must be produced in a reasonably usable form.²⁷ The Advisory Committee notes to the 2006 amendment to Rule 34(b) made what is “reasonably usable” clear when it explicitly stated that “[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.” At bottom the EPA’s argument wrongly treats purely paper records and electronic data as equivalent.²⁸ Courts regard it as improper under Rule 34 to take an electronically searchable document and either destroy or degrade the document's ability to be searched.²⁹

The EPA goes on to claim that it has produced so few e-mails and other sources of electronic data that the Complainant has no

²⁶ The same general point was made by Judge Facciola in *Covad Communications Co. v. Revonet, Inc.*, 254 F.R.D. 147, 150 (D. D.C. 2008) (“For hard copy to be an acceptable format, one would have to believe that Revonet, in its day to day operations, keeps all of its electronic communications on paper. There is no evidence in the record that Revonet operates in this manner, and no suggestion that such a practice would be anything but incredible.”)

²⁷ Fed. R. Civ. P. 34(b)(2)(e)(ii).

²⁸ The distinction is well explained by the Commentary to Principle 12 of the BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2d ed. June 2007) of The Sedona Conference, at pg. 61: “Electronically stored information is fundamentally different from paper information in that it is dynamic, created and stored in myriad different forms, and contains a substantial amount of nonapparent data. Because of these differences, approaching the production of electronically stored information as though it is just the modern equivalent of a paper document collection will likely lead to a failure to fully consider the complex issues involved and a failure to select the most relevant and functional form of production for a particular type of electronic information.”

²⁹ See, e.g., *Covad Communications Co. v. Revonet, Inc.*, 260 F.R.D. 5, 9 (D. D.C. 2009) (citing *Dahl v. Bain Capital Partners, LLC*, 655 F.Supp.2d 146, 150 (D.Mass.2009) (requiring production of spreadsheets in native format); *In re Classicstar Mare Lease Litig.*, No. 507–CV353, 2009 WL 260954, at *3 (E.D. Ky. Feb. 2, 2009) (production may not degrade searchability); *Goodbys Creek, LLC v. Arch Ins. Co.*, No. 307–CV–947, 2008 WL 4279693, at *3 (M.D. Fla. Sept. 15, 2008) (conversion of e-mails from native to PDF not acceptable); *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning*, 586 F.Supp.2d 1250, 1264 (D.Kan.2008) (same); *L.H. v. Schwarzenegger*, No. 06–CV–2042, 2008 WL 2073958, at *3 (E.D. Cal. May 14, 2008) (same); *United States v. O'Keefe*, 537 F.Supp.2d 14, 23 (D. D.C.2008) (applying same principle in criminal case).

interest in being able to search them or otherwise manipulate them electronically in their source formats.³⁰

That argument has things backwards. Any paucity of electronic documents the EPA has provided via discovery doesn't weigh in favor of allowing it to ignore the Complainant's requested form for production; if anything, it suggests compliance with that request should be easy for an organization of the EPA's size and sophistication.

Having failed to offer a timely objection to the Complainant's requested form of production, and given its own arguments about the limited number of documents involved, the EPA must honor the Complainant's request for electronic documents in electronic format. To be sure, in the intervening years of litigation between the 2007 request and the EPA's 2012 response, electronic storage formats have changed, and some of the Complainant's requested formats might be obsolete or no longer ideal. The EPA should provide the documents in the original format in which they exist; if this is impossible, it may present the documents in one of the other formats requested.

The EPA believes it "ridiculous" to think the metadata imbedded in these electronic documents could advance the Complainant's discovery of germane evidence. The bases for its view aren't explained; this argument by insult doesn't carry the EPA's burden. The EPA didn't provide any affidavit or declaration explaining why it would be difficult to provide such metadata.

Other principles that guide discovery of electronically discoverable information support the idea that at least some "metadata" must be produced. Under the The Sedona Conference, BEST PRACTICES, RECOMMENDATIONS, & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION # 12 (2007):

Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

Neither party has shown an agreement that covers the production of metadata. The emails themselves are at least relevant, but I don't know at this point how material to the claim. The Complainant may hope to find something useful in metadata, but that

³⁰ *Id.*

hope, common to all plaintiffs, isn't the accepted standard for ordering the production of metadata. A countervailing responsibility requires me to manage litigation in a way that secures the just, speedy, and inexpensive determination of matters. The Claimant is entitled to the same ability to search the electronic files that EPA has. The files appear to be Microsoft Outlook files, so the .pst files should be produced, in a way that preserves the metadata.

The EPA also need not produce the material in the multiple forms the Complainant requested—the original file format of the information plus in one of five other formats: Rich Text Format, Lotus AmiPro, Lotus 123, Outlook Express, or on default of any of those four, searchable PDF files with all metadata produced along with the contents of the file. One goal of the 2006 amendments was to avoid the need to produce electronically stored information in more than one form. Rule 34(b)(2)(E)(iii) therefore provides that the responding party need not do so. The format request the Complainant made will be treated as his prioritization: the EPA must produce the electronic version of the documents in the first available form in the order the formats were stated in the Complainant's production request. In descending order they are the original file format (presumably .pst files), and if that is not available, then Rich Text Format, Lotus AmiPro, Lotus 123, Outlook Express, or finally PDF.

B. The Complainant Can Discover Information Related to the Discipline of Jim Benetti, a Co-Employee the Complainant Alleges Was Also Retaliated Against for Expressing Safety Concerns

The Complainant also seeks to discover correspondence by laboratory supervisor Dick Hopper between or about Jim Benetti, a co-employee the Complainant alleges suffered employment retaliation in the Las Vegas office for expressing safety concerns. He attaches the affidavit of another co-employee, Dennis Framer, who participated in a 2002 meeting where Jim Benetti was allegedly “bull[ied] to stop asking about the safe handling of some radioactive sources” by Brian Moore, an employee who enjoyed a mentor-mentee relationship with Dick Hopper, the lab supervisor.³¹ According to Framer, Benetti prepared and sent a letter to Hopper complaining about the intimidation, and he believed Benetti received a written reprimand from Hopper for having raised the complaint.³²

³¹ Motion, Appendix at 1–3.

³² *Id.*

This serves as an adequate basis for discovery; correspondence between Hopper and Benetti might shed light on whether Hopper responded to complaints with intimidation meant to stifle an employee's safety concerns. Because Hopper also had supervisory authority over Evans, this sort of proof might aid the Complainant in arguing that I should draw an inference that Hopper would retaliate against whistleblowers such as the Complainant.

The EPA responds that it shouldn't have to provide this information because Benetti's discipline was for an unrelated incident where Benetti allowed unauthorized personnel onto lab property, and his dispute with Moore involved personal issues rather than anything related to safety.³³ This may indeed turn out to be the case, but it isn't a reason to deny discovery simply on the EPA's say-so.³⁴

In a footnote, the EPA also asserts retrieving e-mail correspondence would "either not be possible or would be a prohibitively expensive and time consuming exercise" because both Hopper and Benetti left the agency before 2011, when the EPA started routinely preserving emails of departed employees.³⁵

Rule 26(b)(2)(B) does allow an objection to an electronic discovery request on the basis of "undue burden or cost."³⁶ But this requires more than a general assertion of the kind the EPA has advanced—the party seeking to avoid production based on undue burden or cost must explain its objection with sufficient detail to allow an evaluation of the burdens and costs of providing the discovery against the possible utility of the information sought.³⁷ In the words of one court, "the benefits of Rule 26(b)(2)(B) cannot be invoked on mere speculation or unsubstantiated assumptions."³⁸

The EPA's statement that production would be impossible or prohibitively expensive is just such speculation. Impossibility is one thing, expense another. The Advisory Committee note for the 2006 amendments to Rule 26(b)(2) points out that identifying sources of electronically stored information as "not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve

³³ Opposition at 4.

³⁴ Jim Benetti is deceased, removing both his privacy interest in the matter and the possibility he could provide such information to the Complainant himself.

³⁵ Opposition at 5, n. 4.

³⁶ R. Fed. Civ. P. 26(b)(2)(B).

³⁷ See, e.g., *Mikron Ind., Inc. v. Hurd Windows & Doors, Inc.*, No. C07-532RSL, 2008 WL 1805727, at *1 (W.D. Wash. April 21, 2008).

³⁸ *Cartel Asset Mgmt. v. Ocwen Financial Corp.*, 2010 WL 502721, No. 01-cv-01644-REB-CBS, at *16 (D. Colo. Feb. 8, 2010).

evidence.” According to another portion of that Advisory Committee note, “the responding party has the burden as to one aspect of the inquiry—whether the identified sources are not reasonable accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found.” The EPA failed to detail the ways in which production would be burdensome and how costly it would be; it relegated its objection to a single sentence footnote. The EPA’s opposition to the motion to compel fails to show it investigated the cost of production in any rigorous way. This failure precludes weighing the burden on the EPA of accessing and retrieving the information against “its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”³⁹

The EPA failed to meet its burden to show why it can’t reasonably provide the requested discovery.

III. Conclusion

The Complainant is entitled to electronic copies of the documents the EPA has provided in one electronic format, and to Dick Hopper’s correspondence related to Jim Benetti. The EPA failed to show that undue burden or cost relieves it from the duty to provide the discovery. The EPA must produce the discovery responses in no more than 28 days from the date of this order.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

³⁹ R. Fed. Civ. P. 26 (b)(2)(C)(iii).